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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 101

FEDERAL TRADE COMMISSION, PETITIONER

v.

UNIVERSAL-RUNDLE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 569–575) is reported at 352 F. 2d 831. The opinion of the Commission accompanying its cease-and-desist order (R. 30–45) is reported at Trade Reg. Rep. (Transfer Binder 1963–1965) ¶ 16,948, and the Commission's order denying a stay (R. 62–63) is reported at Trade Reg. Rep. (Transfer Binder 1963–1965) ¶ 16,998.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1965 (R. 576), and a timely petition for rehearing *en banc* was denied on December 17, 1965 (R. 577). Mr. Justice Clark extended the time

for filing a petition for a writ of certiorari to April 16, 1966 (R. 578), and the petition was filed on April 15, 1966. This Court granted the petition on October 10, 1966 (R. 579). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of Section 2 and Section 11 of the Clayton Act, as amended, are set out in Appendix A, *infra*, pp. 29–31.

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by postponing the operation of a Federal Trade Commission cease-and-desist order, without passing on its validity, until the Commission had investigated the trade practices in question on an industry-wide basis.

STATEMENT

Respondent manufactures a full line of vitreous china and cast iron plumbing fixtures. It sells its "Homart" brand fixtures, which constitute a substantial portion of its production, exclusively to Sears, Roebuck & Company, and its "U–R" brand fixtures to independent wholesalers and dealers throughout the United States. In a complaint issued August 4, 1960 (R. 1–3), the Federal Trade Commission charged that respondent violated Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a) (Appendix A, *infra*, p. 29) by charging preferred purchasers of "U–R" products substantially lower prices than those charged non-favored customers. On June 12, 1964,

the Commission sustained the charge,[1] finding that respondent offered "truckload discounts" ranging from 5 to 15 percent[2] on its full line of vitreous china and cast iron products and that, in light of the relative competitive positions of respondent's customers, the effect of the price discrimination resulting from respondent's discounts may be substantially to lessen competition among these customers (R. 38–39). Accordingly, the Commission ordered respondent to refrain from discriminating in price among competing purchasers of its products (R. 28, 29).[3]

On July 20, 1964, respondent petitioned the Commission (R. 46–53) to stay its order for a sufficient time to permit the agency to investigate and institute appropriate proceedings with respect to what respondent alleged to be "the industry-wide practice by plumbing fixture manufacturers of granting discounts

[1] The complaint had also charged that respondent sold "Homart" products to Sears (which owns a majority of respondent's stock) for less than it sold the corresponding "U–R" products to other customers. The Commission dismissed this charge on the ground that "Homart" and "U–R" fixtures were not of like grade and quality (R. 31–34).

[2] Because a truckload purchase may consist of any combination of fixtures (R. 569–570), the resulting discounts for each purchase vary from order to order (R. 18–20). On the average, the discounts equal about 10 percent (R. 43).

[3] The order (R. 28) directs respondent to cease and desist from:

> Discriminating in price by selling "Universal-Rundle" brand or Universal-Rundle manufactured plumbing fixtures (exclusive of the "Homart" brand sold to Sears, Roebuck & Co.) of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products.

in prices on truckload shipments" (R. 47). The petition alleged that, unless this relief were granted, respondent would operate under a "competitive disadvantage and extreme hardship" and probably would suffer a "substantial decline in * * * sales volume" (R. 47). In support of the petition, an affidavit of one of respondent's vice-presidents alleged that respondent's six major competitors were each granting truckload discounts on some of their plumbing fixtures—as revealed by their price lists, which were appended to the affidavit (R. 521–555)—and that he had been informed that some competitors granted discounts of 15 to 20 percent on their entire line in certain areas of the country (R. 54–55).

On August 4, 1964, the Commission denied respondent's petition, stating that "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter" (R. 63). The Commission explained that it had not ruled truckload discounts unlawful *per se* but that their lawfulness depends upon a determination in each case "whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite

anticompetitive effects" (R. 63). The Commission also noted that it would have to take account in each case of statutory justifications offered by the seller. Finally, the Commission indicated that it was not persuaded, by respondent's allegations, that undeferred enforcement of the order against it would cause financial hardship.

Respondent petitioned the court of appeals for review of both the Commission's cease-and-desist order and its order denying the stay. While the case was pending in the court of appeals, respondent's counsel conducted correspondence with an attorney in the Commission's Bureau of Restraint of Trade.[4] In response to respondent's letter of November 16, 1964, inquiring whether an investigation of its competitors' truckload discounts had been undertaken (Appendix C, *infra*, pp. 35–36), the Commission attorney replied, on December 2, 1964, that the agency would not commit its resources to such an investigation unless respondent presented specific information tending to show a greater likelihood that its competitors were violating Section 2(a). The Commission attorney detailed the type of data which would be useful and invited respondent to submit such information (*id.*, pp. 37–38).

After further exchanges of letters, in which the Commission attorney reiterated his invitation to respondent to submit specific data and noted that, if the data were available at all, they would probably be known to respondent and its agents (*id.*, pp. 44, 49–50),

[4] Copies of the relevant portions of this correspondence, which does not appear in the printed record, are printed in Appendix C, *infra*, pp. 35–55.

respondent, on March 4, 1965, submitted some additional information with respect to the customers of two of its competitors (*id.*, pp. 52–53). On March 12, 1965, the Commission attorney acknowledged respondent's letter and indicated that he would prepare a recommendation regarding possible action in light of the additional information and that, in this connection, a further elaboration on the information provided by respondent would be helpful (*id.*, p. 54). On April 19, 1965, the Commission attorney informed respondent's counsel that the Commission would not investigate its competitors' pricing practices at that time because the Department of Justice had advised that such an investigation would conflict with one then being conducted by the Department's Antitrust Division (*id.*, p. 55).[5]

The court of appeals, without determining the validity of the Commission's cease-and-desist order, set aside the denial of the stay. Relying on the allegations in respondent's petition for a stay and its accompanying affidavit, the court found that the Commission had adopted an "inequitable approach" to "an

[5] This investigation, which commenced between February and June 1964, resulted in the filing of two criminal indictments and a civil complaint in the Western District of Pennsylvania on October 6, 1966. The indictments allege that all of the major manufacturers of plumbing fixtures (including respondent and the six companies of which it had complained to the Commission) were engaged in a continuing conspiracy, from September 1962 until some time in 1966, to fix the price of such fixtures. All defendants entered pleas of not guilty on November 15, 1966, and the cases are now pending. *United States* v. *American Radiator & Standard Sanitary Corp., et al.*, Civ. No. 66–1184; *id.*, Crim. No. 66–295; *United States* v. *Plumbing Fixtures Manufacturers Ass'n, et al.*, Crim. No. 66–296 (W.D. Pa.).

industry-wide problem" by proceeding against "a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted" (R. 573). It ruled that the Commission had a "duty * * * to bring into the case before it [respondent's] powerful competitors * * *" (R. 574–575). Referring to the correspondence mentioned above,[6] the court stated that the Justice Department's investigation, "even if not tardy * * * does not qualify as an investigation by the Commission, which, in our opinion, was the agency which was called upon to act in all matters pertaining to the case at bar" (R. 574). Accordingly, the court held that the Commission's denial of a stay was a "patent" abuse of discretion within the meaning of *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, and remanded the case to the Commission for further proceedings "as prayed in the petition of Universal-Rundle Corporation filed July 20, 1964" (R. 575). On December 17, 1965, the Court (Judge Swygert, dissenting) denied a petition for rehearing *en banc* (R. 577).

SUMMARY OF ARGUMENT

The court of appeals' ruling that the Commission was required to stay its order until it had conducted an industry-wide investigation is contrary to this Court's decision in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411. There, where the

[6] Although none of the correspondence was in the record (see n. 4, *supra*, p. 5), respondent included excerpts from the initial letters exchanged (Appendix C, *infra*, pp. 35–38) in its brief in the court of appeals, and, in an addendum thereto, referred to the letter advising of the Justice Department's investigation (*id.*, p. 55).

allegations of the companies involved were similar to, but stronger than, those of respondent here, the Court upheld the denial of stays. It ruled that the question whether Commission orders "should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide" and that the Commission's "discretionary determination should not be overturned in the absence of a patent abuse of discretion" (355 U.S. at 413–414).

The sound principles governing the relationship between courts and administrative agencies which underlay the *Moog* decision should have been, but were not, applied here. The fact that no proceedings have been instituted against others in an industry is no bar to the enforcement of an administrative order against one found guilty of a statutory violation. And the deference that a reviewing court should accord the ancillary features of an agency's orders is particularly great where, as here and in *Moog,* the court's modification of the Commission's order involves an attempt to supervise the agency's investigation and enforcement policies. These policies involve the evaluation of varied and complex factors, not susceptible of detailed judicial review.

Departing from the principles of *Moog,* the court below undertook for itself the Commission's task of finding economic facts and evaluating competing economic interests. The court's findings, however, were based solely on the inadequate allegations in respond-

ent's petition and are not supported by the record. More important, the court wholly failed to consider one of the most significant factors relevant to the decision whether to order a stay—*i.e.*, the adverse effects on respondent's unfavored customers resulting from the court's failure to require respondent to discontinue what had already been administratively determined to be unlawful price discrimination. Moreover, the court's error in staying the Commission's order until the agency had conducted an industry-wide investigation was compounded by its failure to determine the validity of that order. This practice was inconsistent both with the court's obligation promptly to review Commission orders and with sound judicial administration.

In accordance with *Moog,* the court should have limited itself to determining whether the Commission's denial of the stay was patently arbitrary. On this record, we submit, the court could not have properly made such a finding.

Respondent's allegations were belated and inadequate. It was reasonable for the Commission, in determining the optimum allocation of its available funds and personnel, to require respondent to come forward with sufficient information before committing its own resources to an investigation of other plumbing manufacturers. Indeed, after several exchanges of letters with a Commission attorney, respondent ultimately did supply some information as to the custom-

ers of two of its competitors. The Commission's refusal to undertake an investigation at that time was not unreasonable in light of a pending Justice Department investigation of the industry, which resulted in criminal indictments against respondent and all its major competitors. Surely the Commission should not have been compelled to engage in any activity—such as the use of compulsory processes conferring immunity upon witnesses—which would have interfered with such a proceeding. Finally, the Commission did not abuse its discretion in ruling that respondent had failed to make an adequate showing that immediate enforcement of the order would cause it serious competitive injury. Not only were respondent's allegations on this point sketchy and conclusory, they were in striking contrast to respondent's contention—strongly urged during the proceedings on the merits—that it was weeding out customers who did not buy in truckload quantities. If this contention was correct, the Commission order obviously imposed little obstacle to respondent's continuing to offer truckload discounts.

This Court's standard for judicial interference with the agency's enforcement policy—a patent abuse of discretion—bespeaks an extraordinary case, one in which the agency's action is so arbitrary or oppressive that no reasonable justification for it can be found. Certainly, this is not such a case. Here the Commission gave proper consideration to the question, raised by respondent's petition, whether immediate enforcement against one member of an industry is appropriate. Its discretionary determination in this case was not

improper. Indeed, if the kind of showing that respondent made here *required* the Commission to proceed on an industry-wide basis, the Commission would have little opportunity to exercise the discretion which is of the essence of its enforcement determinations. As this Court recognized in *Moog,* to impose such a requirement would seriously undermine the Commission's effectiveness.

ARGUMENT

THE COURT OF APPEALS EXCEEDED ITS AUTHORITY AS A REVIEWING COURT BY POSTPONING THE OPERATION OF THE COMMISSION'S CEASE-AND-DESIST ORDER, WITHOUT PASSING ON ITS VALIDITY, UNTIL THE COMMISSION HAD CONDUCTED AN INDUSTRY-WIDE INVESTIGATION

In *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, this Court held that the question whether Commission orders "should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide" (355 U.S. at 413–414). There, as here, companies[7] ordered to cease and desist from giving discriminatory discounts which the Commission had found violative of Section 2(a) sought to stay the Commission's orders until their competitors—who they alleged were engaging in the same discount practices—were

[7] In *Moog*, the Court affirmed the Eighth Circuit's denial of a stay in *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, and reversed the stay order entered by the Seventh Circuit in *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37.

proceeded against. One of the companies asserted that it was unfair to enforce the Commission's order against it since it accounted for only 1 percent of the sales in the "industry"; the other alleged that its market share was less than one-half of 1 percent and that "it would have to go out of business" if the Commission's order were not stayed (355 U.S. at 412).

Recognizing that "in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment," this Court held (*id.* at 413):

> * * * Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to * * * whether or not the nature of * * * competition [in the relevant industry] is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, *although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency.* It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from post-

> poning a particular order prohibiting continued violations of the law. * * * [Emphasis supplied.]

Thus, the Court concluded, the Commission's discretionary determination not to stay the effectiveness of a particular order may "not be overturned in the absense of a *patent* abuse of discretion" (*id.* at 414; emphasis supplied).

In the present case, although respondent made a weaker showing than the private parties in *Moog*, both as to the likelihood that its competitors were engaged in similar illegal practices and as to the detriment it allegedly would suffer from enforcement of the order,[8] the court below—relying on *Moog*—

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[8] C. E. Niehoff & Co. had offered much evidence, during the initial procedings before the hearing examiner, as to competitive conditions and the discount practices of other manufacturers. Its contention that it was unfair to proceed against it and not the others was vigorously made before the hearing examiner as well as before the Commission. It claimed a miniscule market share (½ of 1 percent) and alleged that it would have to go out of business if the Commission entered an order against it which was immediately effective. See Record, pp. 941–944, 953–956, 975–977, *Federal Trade Commission* v. *C. E. Niehoff & Sons*, No. 110, Oct. Term, 1957.

In contrast, respondent in the present case offered no evidence on this issue at the hearing and claimed only that, if the order were not stayed, it would probably suffer a "substantial decline in * * * sales volume" (R. 47), not that it would go out of business. Contrary to respondent's contention (Br. in Opp., pp. 8–10) *Moog* did not turn on the fact that the Commission had instituted investigations against some—but by no means all—of the companies' competitors. This Court did not even mention this fact in its opinion; rather it addressed itself to the contentions of the private parties there, which were essentially the same as respondent's contentions here.

declared the Commission's refusal to grant a stay "a patent abuse of discretion" (R. 573). This ruling was erroneous. As we shall show, the principles governing the relationship between courts and administrative agencies, on which *Moog* rests, require reversal of the decision below.

1. Congress has "placed the primary responsibility for fashioning orders upon the Commission." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429. The Commission, like other administrative agencies under comparable statutes, has wide discretion in selecting the necessary and appropriate remedy for an unlawful practice, and a reviewing court may interfere only if the Commission has "abused its discretion." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611–612; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. The deference due agency orders—which extends to such "ancillary features" (*Moog*, 355 U.S. at 411) as the time when the order is to take effect—is especially great where, as here, the court's modification of the Commission's order involves an attempt to supervise the agency's investigation and enforcement policies.

It is well settled that an administrative order directed against a statutory violation is not rendered invalid or unenforceable by reason of the fact that no administrative proceedings have been instituted against similarly situated competitors of the party bound by the order. See *United States* v. *Wabash Railroad Co.*, 321 U.S. 403; *Federal Trade Commis-*

sioner v. *Keppel & Bro.*, 291 U.S. 304, 308–309; 312–313. Enormous practical problems of effective enforcement would arise if the Commission were obliged "to decline to enforce [the law] against one because it could not at the same time enforce it against all" (*United States* v. *Wabash Railroad Co., supra,* at 414). Moreover, the Commission's utilization of its resources for investigation and enforcement is an administrative, not a judicial, function. The factors governing such utilization are numerous and complex, and the reasons underlying the agency's decision to follow one enforcement course rather than another are not susceptible of detailed judicial review. As one commentator has observed, judicial superintendence of administrative enforcement policies "through the device of the stay may well be a crude, ill-informed, and destructive interference with the agency's plan." Jaffe, *Judicial Control of Administrative Action* 700 (1965). The courts' role is properly limited to correcting patently arbitrary or oppressive administrative conduct.

2. These sound principles, which underlay this Court's decision in *Moog* (see pp. 12–13, *supra*), should have been, but were not, applied by the court of appeals in the present case. Respondent's allegations were similar to—but weaker than—those of the companies involved in *Moog*. And the two major dissimilarities between this case and *Moog*—the intervening Justice Department investigation with which the requested Commission investigation might have conflicted and the court's failure to pass on the merits of the Commission's order—compounded the

lower court's departure from this Court's ruling.

a. The court's holding that the Commission was duty-bound to proceed on an industry-wide basis, like respondent's petition for a stay, was premised on two largely factual assumptions: that respondent's competitors were "more guilty" than respondent in violating Section 2(a) and that respondent would suffer "competitive disadvantage and extreme hardship" if it were proceeded against alone (R. 47, 573). In making these determinations the court undertook—we submit improperly—to find economic facts and to evaluate competing economic interests. This venture was clearly contrary to *Moog,* and its results sharply demonstrate the soundness of the *Moog* decision.

The court below ignored this Court's admonition in *Moog* that "although an allegedly illegal practice may appear to be operative throughout an industry," it is for the Commission to determine "whether such appearances reflect fact" (355 U.S. at 413). The Commission had made clear, in its original opinion and in its order denying the stay, that truckload discounts were not unlawful *per se* and that respondent's discounts on its full line of vitreous china and cast iron fixtures violated Section 2(a) only because of their practical impact on particular non-favored customers in particular cities. Nevertheless, the court found that respondent's competitors were "more guilty" solely because their average truckload discounts were larger than respondent's (R. 573). But respondent did not allege that any major competitor was offering truckload discounts on its entire line,

as was respondent, and the price lists and bulletins it submitted showed that these competitors offered truckload discounts on only a relatively few items in their broad lines (R. 520, 526–527, 540, 550). More importantly, there was no information before either the court or the Commission which would indicate that these competitors' limited discounts had the adverse secondary-line impact which was the gravamen of the Commission's charge against respondent.[9] The court's assumption that the agency had improperly failed to respond to "an industry-wide problem" (R. 573) was not warranted by the record.

Nor was it proper for the court to undertake an evaluation of the "adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law" (*Moog*, 355 U.S. at 413). The court based its conclusion that it was unfair to enforce the order against respondent solely on respondent's allegation that it was one of the

[9] On the theory that the Commission applied to respondent, the mere showing that a competitor offered some truckload discounts did not indicate a violation of the Act. For example, a particular competitor may have chosen to deal only with the larger retailers and distributors which are capable of purchasing in truckload quantities. Respondent itself indicated that this would have been a sound business practice (see p. 24, *infra*). Or a manufacturer may sell to small customers, but only in a particular market where they are not in competition with a large purchaser which avails itself of the discount. Moreover, even if a discrimination between competing customers were demonstrated, it would not necessarily violate Section 2(a), for the seller may have a valid defense—for example, that its truckload discount does no more than make due allowance for a lower cost of distributing the larger quantity. Clayton Act § 2(a), 15 U.S.C. 13(a).

smallest firms in the industry, its market share being only 5.75 percent. But this figure did not take account of respondent's substantial sales to Sears (R. 50, n. 5) or of the possibility that respondent's competitive posture in certain areas of the country might be stronger than its figures suggest. Moreover, the court wholly failed to take account of the adverse effects on respondent's unfavored customers resulting from the failure to require respondent to discontinue what had already been administratively determined to be unlawful price discrimination. This Court's ruling in *Moog* made clear that it is within the province of the Commission to weigh the primary-line effects of denying a stay against the secondary-line effects of granting it.[10] Thus, the court not only erred in making an economic judgment which should properly have been left to the Commission; in doing so, the court failed to consider one of the most significant factors relevant to such a judgment.

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[10] As one commentator noted (*The Supreme Court, 1957 Term*, 72 Harv. L. Rev. 77, 133 (1958)):

> Although enjoining a company from competing by means of discriminatory prices may destroy it and thus may injure competition, it is by no means clear that sparing this company would justify the injury that might occur at the secondary level of competition. Purchasers who must pay the higher price to the price discriminator may be driven out of business during the period within which the order is held in abeyance, an evil that was uppermost in the mind of Congress at the time the Robinson-Patman Act was passed.

See also, Comment, *Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance*, 115 U. Pa. L. Rev. 40, 43–44 (1966), criticizing the court of appeals' decision in the present case.

The court's error in undertaking for itself tasks properly left to the Commission was compounded by its failure to determine the validity of the cease-and-desist order before deciding whether to stay it. By failing to pass upon the validity of the order the court departed from its statutory obligation promptly to dispose of appeals from Commission orders (15 U.S.C. 21(e)).[11] Moreover, sound judicial administration requires that the reviewing court decide the validity of an order before considering whether it should become effective. For if the order is found invalid, there is no occasion to decide whether it should be stayed. In addition, the decision below could result in a serious and unnecessary waste of the Commission's resources, since, after lengthy industry-wide proceedings in the pattern of the present case, the court of appeals might then rule that the agency's substantive theory is erroneous or that the standards of evidence applied by it were improper.

b. Properly limited, in accordance with *Moog,* the court's function was to determine the validity of the Commission's order and whether its denial of the stay was patently arbitrary or unreasonable. On this record, we submit, the court could not have properly found that the Commission had abused—much less "patently" abused—its discretion.

[11] By reserving its ruling on respondent's petition to set aside the final order against it, the court prevented the order from becoming effective because it does not become final for enforcement purposes until the court of appeals has acted upon it. See Section 11(g) of the Clayton Act, as amended by the Finality Act of 1959, 73 Stat. 244, 15 U.S.C. 21(g).

Respondent, unlike the respondent in *Moog* (see n. 8, *supra,* p. 13), made no claim that the practice with which it was charged was industry-wide in scope until after a cease-and-desist order had been entered against it.[12] Even though it had asserted a defense that it was meeting competition (R. 7), it made no substantial effort to establish this defense before the hearing examiner (see R. 457–462). If respondent believed that the Commission should have been proceeding against others in the industry simultaneously with its case, it never communicated that view to the Commission while the record was open. Instead it adopted, and the court of appeals condoned, a practice which, if followed in the future, would seriously delay Commission proceedings.

When, more than a month after a cease-and-desist order had been entered against it, respondent suggested that an industry-wide investigation was in order, its showing was not such as to have compelled the Commission to accept its suggestion. This is not to say that a respondent must establish a conclusive case against its competitors in order to justify

[12] Contrary to respondent's contention (Br. in Opp., p. 3), *Admiral Corporation*, 56 F.T.C. 1627, 1629–1630, does not sanction the procedure followed here. That case held only that a motion for suspension or postponement would be premature until a cease-and-desist order were actually entered, and that a respondent thus could not adduce evidence relevant to such a motion by subpoena in the main proceeding. There is nothing in *Admiral* to suggest, however, that a respondent should withhold information already within its possession and then, after the Commission's decision on the merits, confront it for the first time with the suggestion that the problem is industry-wide in scope and not susceptible to case-by-case adjudication.

the Commission's institution of an industry-wide investigation. The Commission has never taken such a position. Its decision not to stay its order here merely reflected the fact that respondent had offered no clear indication (1) that the truckload discounts offered by other manufacturers may have actually resulted in unlawful price discrimination among competing purchasers or (2) that it would suffer sufficient competitive injury outweighing the competitive injury its price discrimination inflicted on non-favored customers.

The Commission could reasonably have assumed that the information which might have established the likelihood that the discounts of respondent's competitors caused competitive injury to some of their purchasers, if available at all, could easily have been obtained by respondent—either from its agents or through its other regular sources of information about competitive conditions in the industry. In fact, after several exchanges of letters, respondent did supply information concerning the customers of two of its competitors. To be sure, the Commission could have conducted its own investigation to determine whether additional information was available tending to show violation of Section 2(a) by others in the industry. But, after examining respondent's petition and affidavits and the general sources of information about the industry available to it (such as the file of complaints by members of the public), it was reasonable for the Commision to conclude that such investigation would not represent a profitable or useful expenditure of its limited investigative resources. As *Moog* makes

clear, the Commission has the right "to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically" (355 U.S. at 413). In this case the Commission made the judgment that it could better serve the public interest by pursuing other investigations where there was greater likelihood of developing evidence of statutory violation. It was reasonable for the Commission to require respondent to come forward with sufficient information before committing its own resources to an investigation of other plumbing-fixture manufacturers.

Even assuming, as the court below apparently did (R. 574), that respondent had supplied sufficient information in its letter of March 4, 1965 (Appendix C, *infra,* pp. 52–53), to indicate that two of its competitors were offering illegal discounts, the Commission's refusal to institute an industry-wide investigation at that time was not unreasonable in light of the pending Justice Department investigation of the industry. As this Court has recognized, Congress intended the Commission and the Department of Justice to function as effective partners, rather than rivals, in the enforcement of the antitrust laws (see *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 692–693), and the agencies have devoted much effort to achieving optimum coordination of their activities. See *Report of the Attorney General's National Committee To Study the Antitrust Laws* 374–377 (1955). Contrary to what the court below apparently believed, the Commission did not seek to transfer enforcement of Section 2(a) to the Justice Department; rather it

merely noted that any Section 2(a) investigation it might undertake might conflict with the Department's broader investigation.[13] As we have noted (*supra*, n. 5, p. 6), the Justice Department's investigation resulted in criminal indictments charging all the major participants in the industry (including respondent and the two competitors against which it complained) with participation in a pervasive conspiracy to fix prices, extending from 1962 to 1966. Surely the Commission should not have been compelled to engage in any activity—such as the use of compulsory processes conferring immunity upon witnesses—which would have interfered with such a proceeding.

Regardless of the effect of the Justice Department's investigation, however, and regardless of whether respondent (in its application for a stay or its subsequent correspondence) sufficiently indicated the existence of industry-wide violation of Section 2(a), the Commission did not abuse its discretion in ruling that respondent failed to establish that the immediate enforcement of the order would cause it serious competitive injury. See *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 841, (C.A. 7). Respondent's showing on this point was brief and conclusory;[14] it entirely lacked any specific informa-

[13] For example, a corporate official subpoenaed to testify in a Commission proceeding would be immune from prosecution "for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it" (Federal Trade Commission Act, Sec. 9, 15 U.S.C. 49).

[14] Basically, it consisted of the following statement in the

tion about competitive conditions, the areas in which respondent would suffer, or the nature and impact of the pricing practices respondent could adopt under the order. The absence of such specific data to support its assertion of competitive injury is particularly striking in view of one contention which respondent strongly urged during the proceedings on the merits—*i.e.*, that, because of the unprofitability of selling to customers who did not purchase in truckload quantities, it was in the process of weeding out such customers and limiting itself to larger dealers (see R. 444). If respondent was indeed interested in serving only the large customers, the Commission order obviously imposed little obstacle to its continuing to offer truckload discounts.

3. This Court's standard for judicial interference with agency enforcement policy—a patent abuse of discretion—bespeaks an extraordinary case, one in which the agency's action is so arbitrary or oppressive that no reasonable justification for it can be found. Certainly this is not such a case. The situation here is typical of numerous cases in which a respondent seeks to defer the effectiveness of a

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affidavit of respondent's vice-president (R. 55–56):

> That based upon his knowledge of the competitive conditions in this industry, if respondent is not permitted to sell plumbing fixtures with a differential in price as are its competitors on truckload and less-than-truckload quantities, respondent's sales of plumbing-fixtures under the "U/R" brand will be substantially decreased and lost to its competitors, who continue to offer substantial discounts on truckload shipments. And he is of the further belief that the company may suffer further substantial financial losses if it must be the sole plumbing-fixture manufacturer under an order to cease and desist.

cease-and-desist order, and thus continue its unlawful practice, by claiming the Commission's order, if allowed to become immediately effective, would place it under a handicap *vis-à-vis* its competitors. See, *e.g.*, *United Biscuit Co. of America* v. *Federal Trade Commission*, 350 F. 2d 615 (C.A. 7), certiorari denied, 383 U.S. 926; *W.M.R. Watch Case Corp.* v. *Federal Trade Commission*, 343 F. 2d 302 (C.A. D.C.), certiorari denied, 381 U.S. 936; *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F. 2d 7 (C.A. 2), certiorari denied, 380 U.S. 955; *The Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765, 769 (C.A. 3).

It is the Commission's practice, prior to issuing any complaint, to consider whether the practice involved would more suitably be dealt with through some form of industry-wide proceeding.[15] Pursuant to this practice, it has instituted[16] or refused to institute[17] such proceedings, depending on the particular circumstances. Even after the Commission determines that enforcement on a case-by-case basis is most appropriate, it carefully considers whether it should stay orders against particular respondents in the light of supervening decisions or evidence that competitors in an industry are engaging in similar practices. In some cases, it has granted such stays (see, *e.g.*, *Atlantic Products, Inc.*, F.T.C. Docket No. 8513, Nov. 19,

[15] See Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 1st Sess. (Independent Offices, Part 3), pp. 408–409.

[16] See, *e.g.*, *Transogram Co., Inc.*, 61 F.T.C. 629.

[17] See *Callaway Mills Co.*, FTC Docket No. 7634, Feb. 10, 1964.

1962; Rowe, *Price Discrimination Under the Robinson-Patman Act* 518–519 (1962 ed.), 159 (Supp. 1964)); in others it has denied them.[18]

It was quite proper for the Commission, in the exercise of its discretion, to conclude that the order in this case should not be stayed. If the kind of showing that respondent made here *required* the Commission to proceed on an industry-wide basis, the Commission would indeed have little opportunity to exercise the discretion which is of the essence of its enforcement of the act. The result would be seriously to undermine the Commission's effectiveness; as a practical matter a rigid requirement of simultaneous enforcement against all would frequently lead to effective enforcement against none.

This Court recognized in *Moog* that the formulation of a flexible enforcement policy, guided by an expert knowledge of competitive conditions, was committed by Congress to the Commission. The Court properly noted the dangers of judicial interference

[18] The Commission's records show that since January 1, 1964, there have been at least thirteen other cases, including six under the Robinson-Patman Act, in which the Commission has denied applications for stays such as respondent's. In some of these cases the Commission also had proceeded against a respondent's competitors; in others it had not done so. Synopses of these decisions are set forth in Appendix B, *infra*, pp. 33–34. In other cases, it should be noted, the Commission has granted relief from its orders or dismissed complaints on the basis of intervening decisions involving a respondent's competitors. *E.g.*, *Plough, Inc.*, FTC Docket No. 8563, April 30, 1964 (dismissing complaint); *Towel Shop*, FTC Docket No. 7533, June 4, 1964 (modifying cease and desist order).

in this area and limited judicial authority to an appropriately narrow compass. That decision is wholly applicable here and requires reversal of the court of appeals' stay of the Commission's order.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for a determination of the merits of the Commission's order.

Respectfully submitted.

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